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REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-907

JOSEPH VANHOOK

APPELLANT

VS.

APPEAL FROM WHITLEY CIRCUIT COURT
HON. J. B. JOHNSON, JR., JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed to the Hon. J. B. Johnson, Jr., Judge, Whitley Circuit Court, Whitley County Courthouse, Williamsburg, Kentucky 40769; Hon. Garrett G. Teague, Jr., Commonwealth Attorney, 34th Judicial District, Williamsburg, Kentucky 40769; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 19th day of January, 1976.

Larry H. Marshall

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Supreme Court Of Kentucky

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APPELLEE

* * * * *

MAY IT PLEASE THE COURT:

PURPOSE OF THIS REPLY BRIEF

The purpose of the Reply Brief is to respond to the allegations of fact and law as set out in Appellee's Argument I. In view of the response by the Counsel for the Commonwealth, the issues presented in Appellant's assigned Errors II and III have been placed in traverse; consequently, further amplification and reiteration of these errors are unnecessary and Appellant rests on his initial pleadings.

QUESTION TO WHICH
REPLY BRIEF ADDRESSED

I.

DID THE COURT BELOW ERR TO APPELLANT'S
SUBSTANTIAL PREJUDICE BY ALLOWING THE
PROSECUTOR TO INTRODUCE, DURING DIRECT
EXAMINATION, THE FACT THAT APPELLANT
STOOD MUTE AND FAILED TO INTRODUCE EX-
CULPATORY EVIDENCE AFTER BEING ARRESTED?

ARGUMENT

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING THE PROSECUTOR TO INTRODUCE, DURING DIRECT EXAMINATION, THE FACT THAT APPELLANT STOOD MUTE AND FAILED TO INTRODUCE EXCULPATORY EVIDENCE AFTER BEING ARRESTED.

Appellee advances two flimsy reasons why the introduction of testimony that Appellant failed to offer any exculpatory evidence after being arrested was not reversible error.

First, Appellee argues that since counsel for Appellant did not object at trial, the error was not preserved for appellate review. His logic is that since the error was not preserved, it can not be "so prejudicial as to require reversal of Appellant's conviction."

However, Appellant submits that this error can be considered on appeal. The Sixth Circuit Court of Appeals in Minor v. Black, ___F.2d___ (No. 74-2242, Decided December 8, 1975), has recently held that introduction of testimony that the accused failed to offer exculpatory evidence was "error of constitutional magnitude" which would not prevent that court from granting relief even though the error was not preserved. In the cited case, the court stated:

The failure of petitioner, or his counsel, to timely object at trial to the admission of, and comment on, pre-trial silence for impeachment, though precluding state appellate review. . . cannot preclude federal habeas corpus relief. . . Id.

Eliciting the testimony from Detective Scott, during direct examination, that Appellant failed to offer any exculpatory evidence at the time of his arrest, was a violation of Appellant's

right to remain silent. This constitutes reversible error, even though not preserved for appellate review. Minor, supra.

Appellee also argues that the error amounted to only harmless error since there was "overwhelming circumstantial evidence of Appellant's guilt." But the evidence of Appellant's guilt, was not overwhelming [see Appellant's Brief, Arguments II and III]. This is why introduction of Appellant's failure to offer exculpatory evidence at the time of his arrest was all the more prejudicial.

Before Appellant took the stand in his own defense, his theoretical right to a fair trial was realistically prejudiced by introduction of Detective Scott's testimony. The jury drew a "strong negative inference" of guilt from Appellant's remaining silent at the time of his arrest. Since there was no "threshold inconsistency" between Appellant's silence at arrest and his later exculpatory testimony at trial, the evidence should have been excluded.

Since the constitutional error denied Appellant due process of law, this Court must reverse Appellant's conviction.

CONCLUSION

For the foregoing reasons, and the arguments in Appellant's Brief, Appellant respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

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